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Contractual Transfer of Property with Chinese Characteristics

Abstract:

Similarity of Chinese contractual transfer of ownership to well-known European solutions, makes it appealing to be called a copy, or to assert that it is contradictory to the Chinese political system. Yet, one ought not to be deceived. As it is often with Chinese institutions, a closer look reveals much more ambiguous reality. Chinese context, which consists of its sophisticated and original political and economic system, Confucian thought, and ambiguous social approach towards law, influences every regulation implemented through the process of legal transplantation. Thus, while evaluating particular solution it is crucial to take those hard to define and often unclear factors, into account. Only then it is possible to make a claim about character of such solution, and moreover to observe some unique characteristics of Chinese legal system as a whole.

Key words: property, transfer, legal transplant, contract, China

Umowne przeniesienie własności z chińskimi cechami

Podobieństwo chińskiego modelu umownego przeniesienia własności do dobrze znanych europejskich rozwiązań w tej dziedzinie sprawia, że kuszącym jest nazwać go kopią lub uznać za sprzeczny z chińskim systemem politycznym. Jednakże nie powinniśmy dać się zwieść. Jak często bywa z chińskimi regulacjami, bliższa analiza ujawnia zdecydowanie bardziej niejednoznaczną rzeczywistość. Chiński kontekst, który składa się ze skomplikowanego i oryginalnego systemu politycznego oraz ekonomicznego, myśli konfucjańskiej i ambiwalentnego społecznego nastawienia do prawa, wpływa na każdą regulację implementowaną przez proces prawnej transplantacji. Dlatego właśnie kluczowym jest,

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by opisując konkretne rozwiązania, uwzględnić te trudne do zdefiniowania i często niejasne czynniki. Tylko wtedy możliwe jest twierdzenie o charakterze takiej regulacji oraz obserwacja pewnych wyjątkowych cech chińskiego systemu prawnego jako całości.

Słowa kluczowe: własność, przeniesienie, transplant prawny, umowa, Chiny

1. Introduction

The main objective of this work is to describe and evaluate model of contractual transfer of property in Chinese law. In order to conduct holistic analysis I shall approach this issue from various perspectives. In the first part I will focus on the „classical” models of transferring ownership in civil law, which is central in order to be able to analyse Chinese solution in terms of being a „legal transplant”. Subsequent parts consist of presentation of theoretical legal construction of Chinese model. It is the description of regulations that constitute this model, therefore I will not constrain myself to the particular provisions in which the model is enshrined, but I will also include relevant regulations of other acts, which influence transfer, and therefore differentiate it from „classical” models. As those differences are core of my claim, not only will I focus on legal (i.e. theoretical) contexts that create Chinese contractual transfer of property, but I am also going to include ideological, economic, social and cultural aspects. Thus, subsequent parts focus on characteristics of Chinese legal system and policies, Confucian and Socialist influence and observations of social practices. As a result, holistic view of Chinese model of transfer of property will emerge and thus I will be able to answer pivotal questions of this paper relating to the „nature” of this regulation in the context of legal transplantation, and its contradictory character, which is associated with original character of Chinese regulations, as a whole. It is important to stress that in legal transplantation, unlike in the medical one, transferred rule is not the same in substance, as it is „operating” in different context. Moreover, this new context, „body”, influence and shape the rule that has been implemented into it. And precisely this influence is the main interest of this paper, as I will try to evaluate how „uniqueness” of Chinese system influenced the model of transfer of property, copied from another country. Julio Carvalho approaches the same issue (in respect to transplants generally) from theoretical perspective, taking into consideration impact that language or philosophy in the receiving country has on the transplanted legal concept². I put emphasis predominantly on the influence of relevant legal regulations, economic and political system of China, social reception and underlying ideological approach to such regulation.

Finally it is central to acknowledge that legal transplant (as a result of implementation) is not a binary concept. It means that particular solution ought not to be evaluated as either being transplant or not. In my opinion concept of transplant is gradual, hence specific solutions may be more or less transplants according to their similarity to the „original” ones. By accepting such view we avoid stating that due to even minor

² J. Carvalho, *Law, Language, and Knowledge: Legal Transplants from a Cultural Perspective*, „German Law Journal” 1/2019, p. 21–45.

changes it is no longer a transplant as it is not identical to the one of donor's, or even asserting that transplants are impossible. Thus, the question is rather to what extent given regulation is a legal transplant.

2. Classical models of contractual transfer of property

Transfer of property by contract, in Civil Legal tradition, is divided into German and French approach, following more broad division into German and French legal „sub-families”. In short, German model distinguishes contractual obligation from its proprietary effects, by requiring additional action to be taken in order to accomplish transfer and fulfil the obligation³. The type of required action varies in accordance to character of thing in question, mainly whether it is movable or immovable. Concerning movables Art. 929 of the German Civil Code (BGB) states that for transfer of movable thing its delivery to the acquirer by owner is necessary and the additional agreement between them that ownership is to pass⁴. When immovable is to be transferred, Art. 873 of the BGB requires special registration of title⁵. Thus, process of transferring property in German approach, consist of two separate (although functionally connected) contracts, first has only contractual character and the second one cause proprietary effects. Meanwhile in French model transfer takes place at the time of the conclusion of the contract⁶. Contracts in legal systems that follow the latter model are often described as having „double effect” because no further action is needed to induce *in rem* results.

The discussion on this division concerns both theoretical purity and practical aspects of each of these models. French approach is described as more applicable to „reality of law”. It is argued that transfer of property as direct effect of contract is more likely to be commonly understood by „users” of law and more practical because contract created by parties is sufficient to achieve its purpose (i.e. to transfer ownership). German model, on the other hand, is praised for its clear division of contractual (*in personam*) and proprietary (*in rem*) rights, as well as for achieving certainty of ownership by requiring demonstration of its transfer.

3. Chinese regulation

3.1. Property Law of People's Republic of China

As there is no civil code in China⁷, specific parts of civil law are regulated in separated acts. Therefore Property Law (PR) of People's Republic of China (PRC) is a central

³ S. Sérafin, *Transfer by Contract in Kant, Hegel, and Comparative Law*, „Canadian Journal of Law & Jurisprudence” 1/2018, p. 151–176.

⁴ Translation from: <https://www.gesetze-im-internet.de/englisch_bgb/>.

⁵ S. Sérafin, *Transfer...*, p. 151–176.

⁶ Art. 1196 para. 1 of French Civil Code; translation from: <<https://www.trans-lex.org/601101>>.

⁷ At the moment of creation of this paper there was no Chinese civil code, thus I refer to the previous legal situation, however codification of civil law was passed on 28th May 2020 and will come into force

piece of legislation to be analysed when it comes to the property rights. It was adopted in March 2007, as a result of lengthy and heated debate, and is described as a milestone in the development of Chinese contemporary law⁸. Property rights enshrined in PR relate to tangible things, which are defined as immovable and movable property⁹ (with respect to the Art. 2 para. 1, which provides that rights may also be a subject to the property rights¹⁰). Art. 2 para. 3 provides legal definition of property right as: „the exclusive right enjoyed by the obligee to directly dominate a given thing according to law, which consists of the right of ownership, the usufruct and the security interest on property”¹¹.

Such regulation not only defines property (rights) as a bundle of rights, but by stating that it is exclusive, emphasizes its negative character (i.e. duty of rest of the world not to interfere with the right)¹². Another, arguably the most fundamental, provision of PR is the recognition of private property rights. First legal step towards recognition and protection of private property was done in 2004 by an amendment to the Constitution of People’s Republic of China. The amendment enshrined it in Art. 13 of the Constitution that Citizens’ lawful private property is inviolable and protected.

Nevertheless private property is only one of three types of property regulated in, and protected by PR, as it distinguishes the rights of the State, of the collective, and of the individual persons (i.e. private property)¹³. All these types, at least theoretically, are equally protected by the law, what, understandably, sparked controversy as contradictory to the socialist ideology and economy, in which superiority of public property is one of the core concepts¹⁴. However, such provision does not change legal reality. In fact, public property still holds prominent position and equal protection does not necessarily mean equal role of all types of property¹⁵. In Chapter V of the PR, which is dedicated to this threefold distinction, specific classes of things are assigned to each type of property. In accordance to these articles private ownership concerns such immovables and movables as lawful incomes, houses, articles for daily use, tools for production, and raw and semi-finished materials¹⁶; moreover: the lawful savings and investments of individual persons and the gains derived there from are protected

on 1st January 2021, nevertheless no substantial change to the matter covered in the following paper was introduced.

⁸ A.H.Y. Chen, *The Law of Property and the Evolving System of Property Rights in China* (2010), <<https://ssrn.com/abstract=1615499>>, [accessed: 17.04.2020].

⁹ A.H.Y. Chen, *The Law...*, p. 1.

¹⁰ Translation from: <http://www.npc.gov.cn/zgrdw/englishnpc/Law/2009-02/20/content_1471118.htm>.

¹¹ <http://www.npc.gov.cn/zgrdw/englishnpc/Law/2009-02/20/content_1471118.htm>.

¹² See: S. Douglas, B. McFarlane, *Defining Property Rights* [in:] *Philosophical Foundations of Property Law*, ed. J. Penner, H. Smith, Oxford 2013, p. 219–243.

¹³ Art. 4 PR.

¹⁴ M. Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, „Berkeley Business Law Journal” 5/2008, p. 317–363.

¹⁵ M. Zhang, *From...*, p. 345.

¹⁶ Art. 64 PR.

by law¹⁷. Individual persons, as well as State and collective, may „invest to establish companies with limited liability, companies limited by shares or other enterprises”¹⁸. By contrast, to such narrow enumeration of subjects of private property, PR provides extensive „list” of things that are owned by State¹⁹ or collective²⁰. But rather than to list all of those subjects in this paper, as they are easily accessible in the text of the PR²¹, it is sufficient to assert that State or collective own everything else that is not a subject of private property. This asymmetry emphasizes the dominant role of public ownership. Furthermore, things listed in Art. 64 and Art. 65 have to be „lawful” if they are to be owned by individuals. Such, seemingly harmless term, provides great opportunity for State authorities to define which property is lawful and which is not²², and therefore to restrict ownership of individuals. The question that arises at this point is whether private property refers only to individual ownership or maybe some other entities, specifically legal persons, are also entitled to such property. Legal persons’ ownership is not expressively recognized by PR, nevertheless Art. 68 para. 1 provides that: „An enterprise legal person has the right to possess, use, benefit from and dispose of his immovables and movables in accordance with laws and administrative regulations as well as the articles of association”.

Thus, PR divides legal persons into enterprise legal persons and other, and while the property rights of the former are enshrined by PR, the rights of the latter are regulated in other specific acts²³. Legal persons are generally divided into State-owned enterprises (SOE) and private companies, as it is allowed for private persons to run business (see above). The former type is still playing crucial role in Chinese economy, as 85% of Chinese corporations listed in Fortune Global 500 ranking are state-owned²⁴. However, role of privately owned companies has increased in recent decades, and they are now responsible for 70% of innovation, 80% of urban employment and provide 90% of new jobs, as well as for 70% of investment and 90% of exports²⁵. Such statistics indicates that the role of private entities, and therefore transfers of property conducted by them, is significant.

Chinese model of transfer of property varies on the basis of character of property concerned. Different regulations relate to situations when the subject of the transfer is immovable and when it is a movable thing. The Art. 6 of the PR is the most general provision concerning transfer of property and it creates twofold approach to it by stating

¹⁷ Art. 65 PR.

¹⁸ Art. 67 PR.

¹⁹ Art. 46–52 PR.

²⁰ Art. 58 PR.

²¹ See: <http://www.npc.gov.cn/zgrdw/englishnpc/Law/2009-02/20/content_1471118.htm>.

²² See: M. Zhang, *From...*, p. 337.

²³ Art. 68 para. 2 PR.

²⁴ A. Guluzade, *Explained, the Role of China’s State-Owned Companies*, World Economic Forum (2019), <<https://www.weforum.org/agenda/2019/05/why-chinas-state-owned-companies-still-have-a-key-role-to-play/>>, [accessed: 17.04.2020].

²⁵ A. Guluzade, *Explained...*

that: „transfer (...) of the property right of the immovables shall be registered in accordance with the provisions of law. The property right of the movables shall be created or transferred upon delivery in accordance with the provisions of law”.

Hence, our analysis shall first concentrate on transfer of immovables and the system of registry. The following articles specify the role of registration in the process of transferring immovables. According to the Art. 9 para. 1, such registration is necessary for the transfer to become valid, therefore one can assert that its character is constitutive for the transfer. Constitutive character of the registration implies that one cannot move immovable property without proper registration. However, the registration affects only the validity of the transfer and it does not influence the validity of the contract concerned on the transfer, which: „shall become valid as of the time when the contract is concluded, unless otherwise provided for by law or agreed upon in the contract; and where the property right is not registered, it shall not affect the validity of the contract”²⁶.

Therefore, PR provides clear division of *in personam* and *in rem* effects of the contract. Parties of such agreement create legal obligation between them that is not subjected to the registration, whereas the proprietary results are separated from the contractual „side” of the contract, and dependent on further action. But, as it is necessary to accomplish registration of transfer in order to actually fulfil the obligation deriving from the contract, such procedure has a central role in the process of changing ownership of immovables, especially land. And because this type of subjects of property has a significant importance, economically, politically and socially, the procedure of registration is regulated (relatively) in detail in the PR. The meaning of registration is to ensure certainty in the sphere of rights that are effective against „all others”²⁷. Therefore, primal aim of registry of immovable properties is to provide those „all others”, as well as state’s authorities, with the information who owns the specific thing.

The registration is handled by the special authority at the place where the immovables are located²⁸, although a specific registration has regional character, it is provided that State practices a unified system of registration²⁹. This „regional character” of the registration usually means that it is done at the county level by the administrative court, and the State is responsible for bureaucratic errors through administrative litigation³⁰. Although, more detailed regulations concerning administering of these registries are rather unspecified in the law³¹. The procedure of registration is based on the certificate of the attribution, presented to the authority by the party con-

²⁶ Art. 15 PR.

²⁷ M. Zhang, *From...*, p. 348–349.

²⁸ Art. 10 para. 1 PR.

²⁹ Art. 10 para. 2 PR.

³⁰ S. Qiao, F.K. Upham, *China’s Changing Property Law Landscape* [in:] *Comparative Property Law: Global Perspectives*, Cheltenham 2017, p. 317.

³¹ K. Ayotte, P. Bolton, *The Role of Property Rights in Chinese Economic Transition* [in:] *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century*, ed. D. Kennedy, J.E. Stiglitz, Oxford 2013, p. 236–246.

cerned and other document specifying subject of transfer (e.g. materials on boundary and the area of the immovables)³². Following duties of the authority are generally stated in the Art 12 and include examination of the provided documents, raising inquiries to the applicant with respect to the registration, conducting registration in truthful and timely manner, and following other duties provided by laws. However, probably more significant is what the registration authority cannot do, and according to the Art. 13 it shall not demand evaluation of the property, make repeated registration in the name of annual inspection (etc.) and do other things beyond the limit of the registration duty. The procedure of registration was positively evaluated in the recent report of World Bank³³, especially due to the time in which registration is performed (only 9 days). However, one should take these results with a pinch of salt, because, among other restrictive study assumptions, it gathers data only from Shanghai and Beijing.

Transfer of movables is too often omitted or underestimated, as it is believed that immovables and their transfer has a dominant role as the result of their political status (e.g. ideological role of ownership of land) and higher economic value of particular thing. However, change of ownership of movables has a more down-to-earth character as it is a part of daily life, and therefore one should pay attention to it as well.

Transfer of movables is slightly different, although based on the same theoretical foundations. Just as in the model relating to immovables, in transfer of movables contractual and proprietary effects of the contract are separated, and their validity is subject to different requirements. Art. 23 states that transfer shall become valid at the time of delivery of the movable thing. Delivery, as it stems from the following articles³⁴, means a change of possession of the concerned thing from the obligor to the obligee. Therefore, if transfer is to be valid, a „real” and visible change in the status of the thing is required. Such solution has a similar role to the registration of immovables, it ought to bring certainty to the process, indicating the change in the sphere of rights relating to the thing through a change of its possession. Following articles introduce three exceptions from requirement of delivery. Firstly, if the concerned thing is already possessed by the obligee at the time when transfer is created, it shall become valid when a contract (which creates the transfer) becomes effective³⁵. It is rather obvious, given the role that the delivery ought to fulfil, that no change in possession, that should manifest ownership, is needed when it already represents the legal status of a thing. Secondly, when a thing is possessed by a third party, the obligor may, instead of delivery, transfer the right to request the third party to return the property to the obligee³⁶. And finally, when parties agree that the obligor will continue possession despite the property right being transferred, the transfer

³² Art. 11 PR.

³³ World Bank., *Doing Business 2020: Comparing Business Regulation in 190 Economies*, Washington, DC, p. 35–51.

³⁴ See: Art. 25 and Art. 26 PR.

³⁵ Art. 25 PR.

³⁶ Art. 26 PR.

shall take effect upon the validity of contract itself³⁷. It should also be noted that despite the fact that vessels, aircrafts, motor vehicles etc. are, with respect to the PR, movables, their transfer, unless registered, shall not be used against *bona fide* third party³⁸ (i.e. no claim may be made against such party³⁹).

Another category of constraints relates to specific types of property. The issue of ownership of immovables is, as it was mentioned above, of great political and social value. There is no link between ownership of land and buildings⁴⁰, however there is an exception relating to transfer of right to the use of land for construction use, which effects in transfer of buildings connected to this land, and *vice versa*⁴¹. Nevertheless, the matters of land and buildings are separately regulated. The central issue results from the previous notes on types of property and it is the fact that land cannot be owned by an individual person (i.e. land cannot be privately owned), it belongs either to the State or to the collective, and this division is usually subject to place where the land is situated, as rural land is owned by the farming villages (collectively) and urban land is owned by the State⁴². Therefore, there is no possibility to transfer this type of immovable to the individual and any contract which intend to do so would be invalid as unlawful⁴³. Hence, other forms of property rights, like land-use rights, are transferred, and have a significant role in Chinese real estate market. However, this paper focuses specifically on ownership, thus matter of other rights relating to things goes beyond its scope⁴⁴, and lack of „true” private ownership of land is one of original features of Chinese transfer of property model.

It becomes clear, after this description, that Chinese model of transfer of property by contract, at least from the theoretical perspective, follows the path of German solution in this matter. However, it adopts slightly different approach to the transfer of movables, by requiring only an actual delivery. On the contrary, in German system an additional „real contract” is required in the transfer of movables, but as this solution is considered to be impractical, it was not recognized in PR⁴⁵.

3.2. Contract Law of PRC

The main objective of this paper is the contractual transfer of property, thus regulations of Contract Law (CL) of the PRC⁴⁶ have a crucial influence on this model. Art. 2 of the CL

³⁷ Art. 27 PR.

³⁸ Art. 24 PR.

³⁹ M. Zhang, *From...*, p. 350.

⁴⁰ G.M. Rehm, H. Julius, *The New Chinese Property Rights Law: An Evaluation from a Continental European Perspective*, „Columbia Journal of Asian Law” 2/2009, p. 198.

⁴¹ Art. 146, and Art. 147 PR.

⁴² S. Qiao, F.K. Upham, *China's...*, p. 311–332.

⁴³ Art. 2 and Art. 8 of Land Administrative Law of PRC.

⁴⁴ See: Y.S. Cheng, K.-S. Chung, *Designing Property Rights Over Land in Rural China*, „The Economic Journal” 2018, vol. 128, p. 2676–2710.

⁴⁵ G.M. Rehm, H. Julius, *The New...*, p. 177–234.

⁴⁶ Translation from: http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/11/content_1383564.htm.

provides us with a definition of contract, according to it: „a contract is an agreement between natural persons, legal persons or other organizations with equal standing, for the purpose of establishing, altering, or discharging a relationship of civil rights and obligations”.

It states which subjects of the law can form a contract and create a legal obligation (i.e. individual and legal persons, as well as other organizations), but also provides a fundamental principle of equality of those subjects. Equality of parties, obviously, does not mean that they have to be equal in every respect, especially it does not mean that one party cannot have a better contractual position from the economic perspective, but it means that one party cannot have an authority and power over the other one⁴⁷. Therefore, State can only enter such contract when it does not exercise its sovereignty and acts as an entity in the private law regime⁴⁸. It is a significant restriction, in respect to the property rights, as the State possesses wide range of ownership rights. Even though, in China there is variety of administrative contracts⁴⁹, nevertheless they are not in the scope of interest of this paper. However, beside the equal status of parties, they must have appropriate capacities for civil rights and acts⁵⁰. In respect to natural (individual) persons they must be over 18 years old, and of sound mind. And concerning legal persons they must have been duly formed and in due existence⁵¹.

Article 4 of the CL provides „party autonomy”, by stating that party is entitled to enter into a contract voluntarily under the law and no entity or individual may unlawfully interfere with such right. It does not expressly name this autonomy as a contractual freedom, but such provision is definitely a change in Chinese law towards freedom of contract⁵². According to this article, parties voluntary entrance into contract can only be done in compliance with the law and only unlawful interference with this right is prohibited⁵³. These general restrictions, as well as more specific ones, will be the subject of the following paragraphs, as they limit the possibility of contractual transfer of property. Article 7 provides one of the broadest limitations of parties’ autonomy by stating that: „In concluding or performing a contract, the parties shall abide by the relevant laws and administrative regulations, as well as observe social ethics, and may not disrupt social and economic order or harm the public interests”.

Criterion of not disrupting social and economic order, as well as the harm to the public interests, seem very vague and it may give authorities possibility to arbitrary decide which contracts does and which does not fulfil such requirements, and therefore

⁴⁷ Art. 3 CL.

⁴⁸ X. Qiu, *Contract Law* [in:] *Perspectives on Chinese Business and Law*, ed. L. Golota, J. Hu, K.V. der Borgh, Cambridge 2018, p. 160.

⁴⁹ X. Qiu, *Contract...*, p. 160.

⁵⁰ Art. 9 para. 1 CL.

⁵¹ X. Qiu, *Contract...*, p. 162.

⁵² See generally: M. Zhang, *Freedom of Contract With Chinese Legal Characteristics: A Closer Look at China's New Contract Law*, „Temple International & Comparative Law Journal” 2000, vol. 14, p. 237–262.

⁵³ M. Zhang, *Freedom...*, p. 240.

which are valid. And given the fact that those values are significant for the Chinese State, it may be a real „threat” for the freedom of contract. Another constraint, provided in Art. 38, relates to legal persons and other organizations. It is stated that where state has issued a mandatory plan or state purchase order, the relevant legal persons and other organizations shall enter into a contract. Thus, particular entities are obligated to enter a specific „agreement” even against their will. Although practice of State mandatory plans and purchasing orders has diminished in recent years, and such action is taken only in exceptional situations⁵⁴, it is still a great leverage for State to interfere in the autonomy of parties. A unique solution in Chinese legal system is administrative supervision of contracts⁵⁵. Art. 127 consists general provisions concerning such interference, as it states that administrative authorities shall be responsible for monitoring and dealing with illegal activity in respect to the contracts which harm state or public interests. The Contract Law puts limits to the previous broader competences of administration⁵⁶, yet they are still based on vague criteria of „interests”, and as noted above, such regulation may pose threat for the contractual freedom. On the basis of Contract Law, transfer of property can be done either by the sales contract⁵⁷ or by gift contract⁵⁸. These are the sources of obligation in the process of transfer, which is also emphasized by the fact that sales and gifts are defined as contracts in which the seller or the donor transfers their property⁵⁹.

To summarise, Contract Law of PRC enacted in 1999⁶⁰ moves Chinese law of obligations towards market economy. It diminishes the view that contracts are ancillary to State policies, provides concept similar to contractual freedom and demands equality of parties⁶¹. Nevertheless, it still consists some provisions that contradict this „modern” approach, and allow State to influence the sphere of private obligations.

4. Chinese legal system

4.1. Chinese characteristics

Crucial feature of legal system in modern China is fact of being defined as possessing „Chinese characteristics”. This term is often used to describe particular „parts” of Chinese state, e.g. „socialism with Chinese characteristics”, but still remains ambiguous. Without going into details, it is clear that these characteristics represent combination of features that constitute uniqueness of Chinese system. Following Zhang, Chinese

⁵⁴ C.S. Hsu, *Contract Law of the People’s Republic of China*, „Minnesota Journal of International Law” 2007, vol. 16, p. 122.

⁵⁵ M. Zhang, *Freedom...*, p. 248–249.

⁵⁶ M. Zhang, *Freedom...*, p. 237–262.

⁵⁷ Art. 130 CL.

⁵⁸ Art. 185 CL.

⁵⁹ G.M. Rehm, H. Julius, *The New...*, p. 198.

⁶⁰ See generally: L.A. DiMatteo, *History of Chinese Contract Law* [in:] *Chinese Contract Law: Civil and Common Law Perspectives*, Cambridge 2017, p. 1–2.

⁶¹ See generally: M. Zhang, *Freedom...*, p. 237–262.

legal system may be described as „a civil law system governed by socialist ideology with Confucian ethos representing Chinese tradition”⁶². Thus, each of these ought to be taken into account while evaluating specific regulation.

4.2. Understanding of law

Chinese understanding of law is shaped by thousands of years of history and cultural, as well as political, struggle. In ancient China it was disputed between Legalist and Confucians. For the former law was „an instrumental means to maintain economic order”⁶³, while the latter viewed it more as a supplement to virtues and moral standards⁶⁴, however they did not reject the importance of law completely⁶⁵. Although ancient, this debate still play an important role in Chinese understanding of law. Present Chinese government implements laws as means to improve trade and economic stability, what will be emphasized in the following paragraphs, while subsequently revives Confucianism in order to develop original Chinese tradition and characteristics⁶⁶. As, recently enhanced, Confucian thought does not view law as a crucial factor in organizing society, role of formal regulations is less significant. Confucian perception of law is deeply rooted in social approach towards it (see „Social context” part), thus in practice it is often the case that transfer of property is not based on the provisions of law, but rather on informal social norms and agreements.

Since the Late Qing Dynasty in the early twentieth century western legal tradition has been adopted in China, in order to reform falling Qing’s rule. Later on, in the Republican China, European regulation were directly transplanted to the Chinese legal system, also as a mean of reform (see below), hence civil approach to law is present in Chinese history. However during the Mao’s era, formal law was underestimated and eventually replaced by the party’s policies and Mao’s *Quotations*⁶⁷. Thus, understanding and role of law had to be rebuilt after Mao’s death, however influence of such approach to formal law can still be seen in China. Nevertheless, currently socialist ideology still has significant impact. Through influence of Marx’s understanding of law, in modern China it is commonly defined as the will of dominant class motivated by certain economic conditions, fulfilling needs of society, implemented and secured by the state through its authority and coercive force⁶⁸. Although in practice it means that law is an expression of will of Communist Party, such definition indicates that socialist ideology still underpins law as a whole. More recently the im-

⁶² M. Zhang, *The Socialist Legal System with Chinese Characteristics: China’s Discourse for the Rule of Law and a Bitter Experience*, „Temple International & Comparative Law Journal” 2010, vol. 24, p. 49.

⁶³ M. Zhang, *The Socialist...*, p. 38.

⁶⁴ M. Zhang, *The Socialist...*, p. 38.

⁶⁵ M. Stępień, *Spór konfucjanistów z legalistami. W kręgu chińskiej kultury prawnej*, Kraków 2013, p. 159–160.

⁶⁶ K.C.K. Cheung, *Away from Socialism, towards Chinese Characteristics: Confucianism and the Futures of Chinese Nationalism*, „China Information” 2012, vol. 26, p. 205–218.

⁶⁷ M. Zhang, *The Socialist...*, p. 40.

⁶⁸ M. Zhang, *The Socialist...*, p. 40.

portance has been put on common good regardless the class, so the social nature of law has been emphasized⁶⁹.

Hence, even when particular regulation, that has been created and developed in „western” legal tradition and economic system, is copied, it has to be put into perspective of Chinese understanding of law. Thus, contractual transfer of property is regulated in line with assumption than movement of ownership should be beneficial for the class. It is particularly visible in the lack of private ownership of land (especially in the case of rural areas), and formal impossibility of its transfer. These restrictions, imposed as the will of dominant class (CPC), are justified, among other reasons, as protecting „masses” of farmers from dangers of privatization⁷⁰. Although, the underlying reason is rather to prevent situation of millions of peasants being landless, what would likely cause social disturbance, at the very least⁷¹.

4.3. Socialism

Since the adoption of socialism in 1949, when CPC came to power, Chinese approach to this system has changed drastically. Generally speaking since then China, at least theoretically, is a socialist country, which declares to enforce socialist values etc. Namely, this shift in approach appeared in economic reforms, China opened itself for foreign investment, reformed its economy and introduced many market-oriented solutions. These reforms resulted in adoption of more pragmatic than ideological understanding and realization of socialism⁷². Thus, socialist economy was transformed into capitalist one. However, it does not fit typical frame of free market economy, as State still has the dominant role and its influence is crucial. Such model of state-capitalism is described as „Socialism with Chinese Characteristics”, in which many solutions characteristic for the centrally planned economy are still present, for example „five year” plans, collective ownership of means of production, or central role of Communist Party⁷³. Hence, I think that the thesis that China is „more capitalist” than Western countries, as the result of lack of social safeguards⁷⁴, might be misleading. Absolute power of Communist Party is the central element of China’s political system. Especially original is the nomenclature of doubled State’s structure, which means that official State’s offices have its equivalents in the Party’s structure, and often both of those are held by the same person⁷⁵. Furthermore, Party has a dominant role in this relation. Such combination of different political and economic

⁶⁹ M. Zhang, *The Socialist...*, p. 40.

⁷⁰ S. Qiao, *The Evolution of Land Law in China* [in:] *Chinese Small Property: The Co-Evolution of Law and Social Norms*, Cambridge 2017, p. 1–16.

⁷¹ See generally: M.E. Rithmire, *Property and Politics in China* [in:] *Land Bargains and Chinese Capitalism: The Politics of Property Rights under Reform*, Cambridge 2015, p. 1–30.

⁷² M. Zhang, *The Socialist...*, p. 52.

⁷³ See: Ł. Gołota, *Domestic Political and Economic System of China* [in:] *Perspectives on Chinese Business and Law*, ed. Ł. Gołota, J. Hu, Cambridge 2018, p. 19–42.

⁷⁴ U. Kischel, *Contexts in Asia* [in:] *Comparative Law*, Oxford 2019, p. 694.

⁷⁵ Ł. Gołota, *Domestic...*, p. 25.

solutions creates a unique system that cannot be categorized as purely capitalist or socialist.

What results from such character of Chinese economy, and more broadly political system, is the fact that the use of legal solution – transfer of property – that usually operates in „typical” market economy, will differ in such conditions. It was already pointed out that restrictions relating from Property and Contract Law characterize this institution in socialist legal system. Moreover, change of ownership in such centrally governed state – absolute power of CPP – cannot be as certain and credible as in the origin systems. Influence of socialism is especially visible in respect to dominance of public ownership, which is probably most distinctive characteristic of Chinese Property regulations⁷⁶.

5. Social context

Social practice of transfer of movables is easier to present as it (transfer) is less formal, and more common. Chinese approach proves to be very intuitional and practical due to the dependence of transfer on change of possession. Such simple mechanism, based on requirement physical transfer of particular thing (delivery), is useful in respect to avoiding, or facilitating disputes over ownership⁷⁷. Therefore, Chinese approach, which in this aspect is different from the „classical” one, is easily understandable and practical. Thus, in respect to movables, Chinese approach is both practical like French model, and theoretically correct like German solution, as it separates contractual and „real” effects. Moreover, not only does transfer of ownership of movable things has noticeable role in Chinese economy, what is proved for example by Retail Sales importance and success of Alibaba’s services, but it also does not provoke such political and social controversies as transferring immovables.

As it was already mentioned, due to the fact that only State and collectives can own land, the land-use rights have the status of *de facto* private ownership, or rather its closest possible equivalent. As I do not intend to focus on the complicated issue of land-use rights and their role, but rather to use it as an indicator of social attitude towards regulations relating transfer of things, I will use an example of „small property” problem.

Legal prohibition of nonagricultural use of rural land by collective owners combined with rapid urban development, resulted in formation of illegal real estate market. The problem of small property concerns illegal transfer of rural land for urban and commercial purposes⁷⁸. Research on the Shenzhen’s small property phenomenon, indicates how society reacts to rules relating to property. As Qiao asserts: „The formation of the small-property market in Shenzhen is a revolt against

⁷⁶ M. Zhang, *The Socialist...*, p. 53.

⁷⁷ S. Qiao, *Small Property, Big Market* [in:] *Chinese Small Property: The Co-Evolution of Law and Social Norms*, Cambridge 2017, p. 66–95.

⁷⁸ S. Qiao, F.K. Upham, *China’s...*, p. 321.

the formal law”⁷⁹. This example indicates that Chinese society does not always follow restrictions and requirements of transfer of property procedure, but rather rely on interpersonal trust (as such transfers are void). That brings us again to Confucian approach to law, as its impact resulted in still strong belief that law is not enough to govern and regulate a society⁸⁰. Therefore, such attitude toward law constitute noticeable difference between Chinese model of transfer of ownership and its „western” equivalents. Formality of law, particularly in property law, has pivotal role in Civil Law tradition, whereas in China we can observe, at least, ambivalence in this matter. Hence, even if Chinese solutions follow German model, it does not obtain equal role and importance in practice. Moreover, the fact that China operated without clearly defined and „strong” property rights, and now when the regulations are enacted they does not always are „fully enforced”, but yet managed to achieve enormous economic and social success, proves that highly formal property rights are not *sine qua non* for development.

6. Conclusions

6.1. Chinese transfer as a legal transplant

After analysis of provisions and non-legal conditions that create Chinese model of contractual transfer of property, it is time to answer the first of questions of this paper, it is to what extent such solution can be still described as a legal transplant.

Legal transplantation was a method of improving Chinese law since the beginning of past century⁸¹. At the beginning I distinguished process of copying particular solution from its result, i.e. copied solution functioning in new context. Thus, before undertaking evaluation of legal copy as it currently exists, it is important to highlight reasons why it was even copied. Growing role of China in global economy resulted in need for harmonization with „rest of the world” and reformation of its legal system in order to attract investment and simplify exchange⁸². Thus, German model, widely accepted in many other legal systems, fulfil this criterion. It also provided some sort of prestige to the reformed Chinese legal system. Moreover, as it was already mentioned, this solution is aimed to guarantee certainty of changes of ownership, and therefore stabilize the process of exchange of goods and realization of rights. In addition, disadvantages of „German transfer”, i.e. inapplicability to reality of requirement of forming additional contract in order to achieve proprietary effects, were overcome by demanding only delivery of movable things. Hence, even more practical approach has been adopted in Chinese system. Additionally, transplants from German legal tradition were done

⁷⁹ S. Qiao, *Small...*, p. 74.

⁸⁰ M. Zhang, *The Socialist...*, p. 43.

⁸¹ Y. Zhao, M. Ng, *The Law, China and the World* [in:] *Chinese Legal Reform and the Global Legal Order: Adoption and Adaptation*, ed. Y. Zhao, M. Ng, Cambridge 2017, p. 1–12.

⁸² D. Kennedy, J.E. Stiglitz, *Introduction* [in:] *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century*, ed. D. Kennedy, J.E. Stiglitz, Oxford 2013, p. 6.

on large scale in the past (e.g. 60–70 percent of Chinese Civil Code from 1930 were taken directly from German law)⁸³.

However, China has undertaken legal reform on massive scale not only for such „noble” reasons. Reforming law, also through borrowing foreign solutions, is a mean of maintaining political power as well⁸⁴. As China adapted more and more „western” regulations, and developed its „version” of market economy, many authors asserted that it would result in political reforms and democratization. However, at the moment, there is no doubt that China is not developing in line with these predictions, and legal reform helped CPC’s absolute power to prevail. To summarise, Chinese model of transfer of ownership is clearly implemented through method of legal borrowing, as it is often the case in China.

However, it is the separate matter whether a regulation enacted in such way, can be still called a legal transplant. In other words, is contractual transfer of property in Chinese law similar to the German (or generally „western”) model enough to be labeled as a transplant? I evaluated provisions of particular acts, contexts of legal thought and understanding of law, socialist ideology and policies, Confucian influence, and last but not least, social practices relating to property rights, which constitute highly original legal institution. These characteristics are unmet in „origin countries” of this model of transfer, and unique for China. They actually can be described as Chinese characteristics of this solution, and therefore show how different this seemingly similar solution really is. As it was stated, China through decades of reforms created one of a kind system, that cannot be compared as similar to any other, neither can regulation operating in a sphere especially influenced by it. Hence, I assert that Chinese contractual transfer of property is original and significantly different from its „western equivalent”. Although it does not mean that is not a transplant at all, but rather that it is situated on spectrum far from being just a copy, as it has too many distinctive and new characteristics. Thus, it is model of transfer of property with Chinese characteristics, although inspired by German approach.

6.2. Contradictory character of the regulation

t the first sight, such model of transfer of property, which to some extent is based on private property and allows their transfer among individuals, is at least inspired by foreign („western”) legal system, and moreover was already adopted before Communist revolution by adversaries of present government (Kuomintang), seems contradictory on two levels. Firstly, it is, seemingly, in contrast to Chinese socialism, and secondly to the previous actions of Chinese state, as one of first steps they took when they came to power in 1949 was to annul laws enacted by the Kuomintang, including those relating to property⁸⁵. However, as it was already explained, since the reforms of Deng Xiaoping China adopted pragmatistical approach, in which it is acceptable to „use” solutions

⁸³ U. Kischel, *Contexts...*, p. 689.

⁸⁴ K. Wang, *Whateverism with Chinese Characteristics: China’s Nascent Recognition of Private Property Rights and Its Political Ramifications*, „East Asia Law Review” 2011, vol. 43, p. 86.

⁸⁵ U. Kischel, *Contexts...*, p. 691.

contradictory to „classical” socialist values. It is well illustrated by Deng’s quote that: „It doesn’t matter whether a cat is black or white, as long as it catches mice”, as well as by slogan: „foreign things must be put to Chinese use”. Hence, separation of economic sphere from ideological declarations, and adoption of utilitarian approach result in possibility of implementation of seemingly contradictory solutions. Moreover, it is reasonable to assert that originality of Chinese system, and even success of this project, is based on continuous contradictions. Through dialectical struggle between socialist policy and capitalist market approach, unique social, economic and legal institutions are created. Therefore, not only contractual transfer of property is not contradictory to socialist ideology, because it fits the dialectical way of development, but it is also not contrary, in the extent to which it is opposite to the previous actions of government, as it values pragmatism more than historical consistency. Moreover, some impact of Confucian tradition may be taken into account, namely the concept of harmony. It is noticeable part of Confucian thought to conciliate differences and to seek harmony⁸⁶. Although it is mostly an objective in respect to organizing society, it has been used by CPC to justify contradictions of system with „Chinese characteristics”⁸⁷, thus it makes transfer of property model compatible not only with actual policy of China, but also with its axiological foundations.

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⁸⁶ M. Zhang, *The Socialist...*, p. 45.

⁸⁷ M. Zhang, *The Socialist...*, p. 45.

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